

RECEIVED

OCT 3 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Self-Certification of)	
Valor Telecommunications of)	DA 00-1882
New Mexico, LLC, and)	
Valor Telecommunications of Texas, LP)	
as Rural Telephone Companies)	

**WESTERN WIRELESS REPLY COMMENTS OPPOSING
RURAL TELEPHONE COMPANY SELF-CERTIFICATION**

Western Wireless Corporation ("Western Wireless") submits that the Commission should reject the arguments raised by Valor and its supporters, and should conclude that Valor does not qualify as a rural telephone company ("RTC") under Section 3(37)(D) of the Communications Act of 1934, as amended ("Act"). 1/

First, notwithstanding Valor's statutory arguments to the contrary, the plain language of the statute makes it clear that a carrier like Valor that did not exist before 1999 cannot have had "less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications

1/ 47 U.S.C. § 153(37)(D). This Reply is filed pursuant to Public Notice, *Western Wireless Corporation Petition to Reject Rural Telephone Company Self-Certification filed by Valor Telecommunications Southwest, LLC*, CC Docket No. 96-45, DA 00-1882 (rel. Aug. 17, 2000), which sought comment on Western Wireless' request that the FCC reject the purported self-certification as rural telephone companies ("RTCs") filed by Valor Telecommunications Southwest, LLC, and subsidiaries Valor Telecommunications of Texas, LP, and Valor Telecommunications of New Mexico, LLC (collectively, "Valor"), on June 27, 2000.

No. of Copies rec'd 014
List ABCDE

Act of 1996.” 2/ Moreover, the structure and context of Section 3(37) make it clear that Valor is in error when it argues that Section 3(37)(D)’s reference to the enactment date of the 1996 Act merely freezes in time the size of the larger communities in which a putative RTC may have up to 15 percent of its access lines. Rather, as we show below, unlike subsections (A), (B) and (C) of Section 3(37) – which account for newly formed RTCs and growth among existing RTCs – Section 3(37)(D) applies only to carriers that had the specified characteristics at the time the 1996 Act was adopted.

Furthermore, the Commission must reject Valor’s contention that the anti-competitive effects of its supposed self-certification are not relevant to this proceeding. We show below that Section 3(37)(D) should be implemented in a manner consistent with the overall pro-competitive thrust of the 1996 Act. The Commission should not countenance the anti-competitive consequences that would result from treating carriers like Valor as RTCs.

I. THE PLAIN MEANING, STRUCTURE, AND CONTEXT OF SECTION 3(37)(D) EXCLUDE CARRIERS LIKE VALOR

Valor does not qualify as an RTC under Section 3(37)(D) of the Act. Valor did not exist on the date of enactment of the 1996 Act, and it therefore did not have “less than 15 percent of its access lines in communities of more than 50,000” on that date. Nor did GTE Southwest, Inc. (“GTE”), from which Valor purchased several hundred thousand access lines in Texas and New Mexico, qualify as an RTC

2/ 47 U.S.C. § 153(37)(D).

under Section 3(37)(D) of the Act. GTE had substantially more than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996. Western Wireless concurs with Leaco's assessment that "Valor, by purchasing the GTE exchanges, is essentially 'stepping into the shoes' of GTE which did not satisfy subsection (D) on February 8, 1996." 3/

The plain meaning of Section 3(37)(D) is that it applies only to carriers that on the date of enactment met the quantitative qualifications set forth in the text of that provision. The date reference in Section 3(37)(D) does not merely qualify the size of communities a carrier might serve; rather, it characterizes the *carriers* that may qualify under that subsection. The clauses establishing quantitative limits on the percentages of access lines and on the sizes of communities *each* serve to characterize which carriers – in existence on the date of enactment of the 1996 Act – are covered by Section 3(37)(D). 4/

There is no basis for the untenable interpretation of Section 3(37)(D), offered by Valor and others, that the reference to the date of enactment of the 1996 Act serves only to modify and render static the populations of the communities of over 50,000 in which an RTC may have up to 15 percent of its access lines. 5/

3/ Leaco Rural Telephone Cooperative at 3 ("Leaco").

4/ Valor misinterprets the use of the present tense verb "has" in the Section 3(37)(D) definition of RTC. Valor at 8-9 (arguing that Congress would have used "had" rather than "has" if it had intended Section 3(37)(D) to apply only to incumbent carriers). At bottom, it is clear that the definition of a carrier that "has x lines in y areas on the date of enactment" refers to carriers that exist in the present tense, *i.e.*, those in existence on February 8, 1996.

5/ Valor at 7-12; Comments of Iowa Telecommunications Service, Inc., at 2-6 ("Iowa Telecom").

Another pair of subparagraphs in the same statutory provision – Section 3(37)(A)(i) and (ii) – demonstrate that Congress knew how to both “grandfather population statistics,” 6/ as in Section 3(37)(A)(ii)’s reference to Census Bureau definitions of “urbanized area” as of a fixed date, as well as how to set a definition based on a moving target, as in Section 3(37)(A)(i)’s definition “based on the most recently available population statistics of the Bureau of the Census.” 7/ Valor’s statutory argument ignores the fundamental “canon that when Congress uses different language in different sections of a statute, it does so intentionally.” 8/ Had Congress intended to include a similar definition in Section 3(37)(D), it would have done so. 9/

Moreover, the structure of the statute demonstrates that Valor’s argument is wrong. Section 3(37) provides four means for a carrier to qualify for RTC status: (A) not serving *urbanized* areas or large incorporated metropolitan communities; (B) serving a small *total number of access lines* (fewer than 50,000); (C) serving a small *study area* (with fewer than 100,000 lines); or (D) having a small

6/ Iowa Telecom at 2-6; Valor at 9.

7/ See 47 U.S.C. § 153(37)(A)(i) and (ii).

8/ *Florida Public Telecommunications Ass’n v. FCC*, 54 F.3d 857, 861 (D.C. Cir. 1995). In this context, this canon of statutory interpretation clearly trumps Valor’s narrow technical argument based on the “rule of the last antecedent.” Valor at 9.

9/ Contrary to Valor’s argument, the FCC’s Tenth Report and Order does not support the notion that Section 3(37)(D) is a “community population grandfathering” provision. Valor at 9-10 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Tenth Report and Order, 14 FCC Rcd 20156, 20352, ¶ 444 (1999) (“Tenth Report and Order”)) (emphasis added); *accord*, Iowa Telecom at 3. Clearly, the Commission required carriers to provide lists of communities of more than 50,000 and census data in support of a Section 3(37)(D) self-certification only because population data – as of February 8, 1996 – will determine whether carriers

proportion of lines in large communities. ^{10/} The drafters of Section 3(37) were aware that community populations increase and decrease, and so in Section 3(37)(A), as discussed above, they provided specific reference points for measuring community size. Similarly, the drafters evidently were aware that local telephone companies grow and shrink through acquisitions and sales of exchanges, and so in Section 3(37)(D) they provided a specific reference point for measuring the proportion of a company's service area as rural. The reference point was the status of the company as of the date of enactment.

The purpose of the RTC provisions of the 1996 Act is not to insulate rural carriers from an increasingly competitive environment, but rather to allow existing small carriers additional time to adjust to that environment. There is no rational basis for insulating newly formed carriers like Valor from competition based on the proportion of their service area that is rural. To be sure, new carriers may qualify for RTC status under Sections 3(37)(A), (B), or (C) if they meet the rural criteria in those paragraphs (*i.e.*, not serving urbanized areas, or serving small

had 15 percent or more of their access lines in communities of more than 50,000 on that date.

^{10/} Contrary to Valor's supporters' arguments that Western Wireless' position "would dictate that no new rural carrier would ever be certified as an RTC," Iowa Telecom at 3; *accord*, Comments of Independent Telephone & Telecommunications Alliance at 3-4 ("ITTA"), new RTCs may still be certified if they meet the criteria in Sections 3(37)(A), (B), or (C), which are current- and/or forward-looking definitions. Only Section 3(37)(D) looks back to the date Congress adopted the 1996 Act, and that provision of Section 3(37) is the only one under which new RTCs may potentially not be certified. Thus, precluding companies like Valor from qualifying as RTCs would in no way negatively impact companies like Iowa Telecom, which states that it qualifies under Sections 3(37)(A) and (C). *See* Iowa Telecom at 1. In fact,

aggregate numbers of lines or small study areas). But newly formed companies, by definition, can control their own relative proportion of lines in smaller and larger communities, and thus the logic of paragraph (D), as well as its plain meaning, demonstrates that this paragraph does not apply to carriers like Valor. 11/ The Commission therefore must reject the misguided statutory interpretations put forward by Valor, ITTA and Iowa Telecom. 12/

II. THE COMMISSION SHOULD RESOLVE QUESTIONS CONCERNING THE INTENT OF SECTION 3(37)(D) IN A MANNER CONSISTENT WITH THE PRO-COMPETITIVE THRUST OF THE 1996 ACT

The Commission should adopt a pro-competitive interpretation of Section 3(37)(D) if the language in that provision is deemed ambiguous with respect

Iowa Telecom's status clearly demonstrates Congress' intent in crafting Section 3(37) to provide some means of qualifying as an RTC going forward.

11/ Section 3(37)(D) was never intended to allow the non-RTC access lines of large incumbent LECs such as GTE to qualify as RTC lines, simply because they are split off and sold to form a new carrier. Even though its sole entry into the market consists of purchasing lines from a large non-RTC, Valor seeks the FCC's blessing to newly cloak its service areas in RTC protection. In so doing, Valor would garner a shield to shelter itself from, inter alia, competition by new entrants seeking to provide supported universal service in high-cost markets.

12/ Valor contends that interpreting Section 3(37)(D) to deny Valor RTC status would inhibit the purchase and improvement of rural exchanges. Valor at 14; accord ITTA at 5-6. But as noted above, new RTCs can qualify under Section 3(37)(A), (B), and (C). Moreover, like the Commission's study area freeze and waiver orders, the only consequence of properly interpreting Section 3(37)(D) in this context will be that the purchase price of existing facilities would reflect that the new carrier will not be able to shield itself from competition, and that the seller and buyer will not be able to game the Commission's universal service support mechanisms. See 47 C.F.R. § 36 app. (defining "study area"). See also *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984); Decision and Order, 50 Fed. Reg. 939 (1985); *Valor Telecommuni-*

to whether companies like Valor may claim RTC status under Section 3(37)(D).

Valor contends that Western Wireless' arguments based on the effects on competition are irrelevant because that is not a criterion under Section 3(37). ^{13/} But the effects of competition are a major factor in understanding what the public interest requires, and the legislative history of the 1996 Act makes it clear that Congress expected the FCC to resolve ambiguities in favor of promoting competition in all telecommunications markets. ^{14/} When faced with an ambiguous provision in the Communications Act, the Commission is accorded substantial deference in interpreting and/or implementing the provision. ^{15/}

The best way for the Commission to reconcile the RTC provisions in the 1996 Act with the Act's overall focus on advancing competition is to interpret Section 3(37)(D) in a manner that carries with it the fewest impediments to competitive entry. As shown in the Petition to Reject, the 1996 Act's RTC provisions – though deemed necessary from a net policy perspective – carry with them serious

cations of Texas, LP, and GTE Southwest Incorporated, CC Docket No. 96-45, Order, DA 00-1908 , ¶¶ 3, 9 (rel. Aug. 21, 2000) (study area waiver).

^{13/} Valor at 13.

^{14/} Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) at 1 (1996 Act is "a pro-competitive, de-regulatory national policy framework" with objective of "opening all telecommunications markets to competition"). See also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000) ("Because Congress has conferred broad discretion on the agency to negotiate these dual mandates [of universal service and local competition], courts ought not lightly interfere with its reasoned attempt to achieve both objectives."); *Stiles v. GTE Southwest, Inc.*, 128 F.3d 904, 907 (5th Cir. 1997) ("In interpreting a statute, our objective is to give effect to the intent of Congress.").

^{15/} See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

consequences that inhibit competitive entry. 16/ For example, Leaco clearly shows that treating a carrier like Valor as an RTC would impose barriers to entry for very small carriers like Leaco that would “stymie competition” in Valor’s service area. 17/

Leaco’s experience in New Mexico, as well as Western Wireless’ in Texas, clearly show that ITTA is wrong in its assertion that “validating Valor’s RTC status will not materially impair the ability of other telecommunications carriers to obtain or maintain [ETC] status.” 18/ In both states where Valor claims RTC status, Valor has objected to the designation of competitive eligible telecommunications carriers (“ETCs”) seeking to provide universal service in the areas served by Valor. In essence, Valor is attempting to use its claim to RTC status to prevent Western Wireless, Leaco, and possibly others, from providing universal service in competition with Valor. Valor’s conduct is highly offensive and demonstrates that Western Wireless’ concerns are well-founded. 19/

16/ See Petition to Reject at 9.

17/ Leaco at 5-6. Notably, Leaco’s showing that Valor does not qualify as an RTC in New Mexico under Section 3(37)(C) appears to refute completely Valor’s contention to the contrary. Compare Leaco at 3-4 with Valor at 14-15.

18/ ITTA at 1-2.

19/ Contra Valor at 13 (“[t]here is no basis” to Western Wireless’ argument that honoring Valor’s claimed RTC status “will be ‘profoundly anti-competitive’ and deprive customers of choice”) (quoting Petition to Reject at 8-9).

III. CONCLUSION

Based on the foregoing, Western Wireless respectfully requests that the Commission issue a ruling rejecting Valor's purported self-certification, and concluding that Valor does not qualify as an RTC under Section 3(37)(D) of the Act.

Respectfully submitted,

WESTERN WIRELESS
CORPORATION

By: 

Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

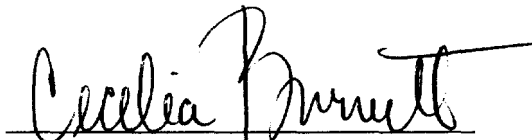
Gene DeJordy,
Vice President, Regulatory Affairs
Jim Blundell, Director of External Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave. S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Counsel for Western Wireless
Corporation

Dated: October 3, 2000

CERTIFICATE OF SERVICE

I, Cecilia Burnett, hereby certify that on this 3rd of October, 2000, in addition to the courtesy copies sent to the individuals on the attached Service List, the foregoing Reply Comments were served on the following by hand delivery or by mail.



Cecilia Burnett

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
(counsel for Valor
Telecommunications)

Rocky Unruh
Morgenstein & Jubelirer, LLP
One Market Plaza
Spear Street Tower, 32nd Floor
San Francisco, CA 94105
(counsel for Valor
Telecommunications)

Benjamin Dickens
Mary Sisak
Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, DC 20037
(counsel for Valor
Telecommunications)

James A Troup
Brian D. Robinson
Arter & Hadden LLP
1801 K Street, N.W., Suite 400K
Washington, DC 20006-1301
(counsel for Iowa Telecommu-
nications Services, Inc.)

Karen Brinkmann
Richard R. Cameron
Nandan M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004-2505
(counsel for Independent Telephone
& Telecommunications Alliance)

David W. Zesiger
Executive Director
The Independent Telephone and
Telecommunications Alliance
1300 Connecticut Avenue, N.W.
Suite 600
Washington, DC 20036
(counsel for Independent Telephone
& Telecommunications Alliance)

Caressa D. Bennet
Kenneth C. Johnson
Bennet & Bennet, PLLC
1000 Vermont Avenue, N.W.
Tenth Floor
Washington DC 20005
(counsel for Leaco Rural Telephone
Cooperative, Inc.)

Public Utilities Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, TX 78711-3326

SERVICE LIST

Kathy C. Brown
Chief of Staff
Office of Chairman William Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D. C. 20554

Anna Gomez, Legal Advisor
Office of Chairman Wm. E. Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan Goldstein, Legal Advisor
Office of Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Rebecca Beynon, Legal Advisor
Office of Comm'r Harold Furchgott-Rott
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Kyle Dixon, Legal Advisor
Office of Comm'r Michael Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Sarah Whitesell, Legal Advisor
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Dorothy Attwood
Common Carrier Bureau Chief
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Carol Matthey
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Katherine Schroder
Division Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Sharon Webber
Deputy Division Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Lisa Boehley
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 8-A668
Washington, D.C. 20554

Katie King
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Robert Loube
Policy Analyst
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Richard D. Smith
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Jack Zinman
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Cynthia B. Miller
State of Florida Public Service
Commission
Bureau of Intergovernmental Liaison
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Charles J. Scharnberg
SBC Communications Inc.
1401 I Street, N.W., 11th Floor
Washington, D.C. 20005

L. Marie Guillory
Jill Canfield
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Steven R. Beck
QWEST Corporation
1020 19th Street N.W.
Suite 700
Washington, D.C. 20036

Richard D. Coit
General Counsel
South Dakota Independent Telephone
Coalition
207 E. Capitol, Suite 206
P.O. Box 57
Pierre, SD 57501

Milton Hooper
Chairman
Goshute Business Council
Confederated Tribes of the Goshute
Reservation
P.O. Box 6104
Ibapah, Utah 84034

Sam S. Painter
General Counsel
Crow Tribal Council
P.O. Box 159
Crow Agency, Montana 59022

Joseph F. McCornell
President
Fort Belknap Indian Community Council
Fort Belknap Indian Community
R.R. 1, Box 66
Fort Belknap Agency
Harlem, Montana 59526

William Kindle
Chairman
Rosebud Sioux Tribe of South Dakota
Rosebud Sioux Tribe
Sicangu Oyate
P.O. Box 430
Rosebud, South Dakota 57570

James A. Casey
Greenberg Traurig, LLP
800 Connecticut Avenue, N.W.
Washington, D.C. 20006

Alice E. Walker
Scott B. McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302

Wilbur Between Lodges
Vice Chairman
Oglala Sioux Tribe
Box H
Pine Ridge, South Dakota 57770

International Transcription Service
Federal Communications Commission
1231 20th Street, N.W.
Washington, D.C. 20554